IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 6, 2008

STATE OF TENNESSEE v. VICTOR L. DOBBINS

Appeal from the Criminal Court for Davidson County
No. 2006-C-2624 Cheryl A. Blackburn, Judge

No. M2007-01751-CCA-R3-CD - Filed July 3, 2008

The Appellant, Victor L. Dobbins, appeals his conviction and the sentencing decision of the Davidson County Criminal Court. After a bench trial, Dobbins was found guilty of being a convicted drug felon in possession of a handgun, a Class E felony. The trial court sentenced Dobbins, as a Range Two, Multiple offender, to four years in the Tennessee Department of Correction, and ordered that the sentence be served consecutively to community correction sentences being served by Dobbins for two prior felony drug convictions. On appeal, Dobbins argues (1) that the evidence was legally insufficient to support his conviction for unlawful possession of a handgun; (2) that the trial court erred in enhancing his sentence to the statutory maximum within the applicable range based largely on Dobbins' previous history of criminal convictions; and (3) that the trial court erred in running the sentence consecutively to sentences being served for previous drug convictions based upon Dobbins' extensive record of criminal activity. After review of the record and the briefs of the parties, we affirm.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

DAVID G. HAYES, SR.J., delivered the opinion of the court, in which DAVID H. WELLES and JAMES CURWOOD WITT, JR., JJ., joined.

Nathan Moore, Nashville, Tennessee, for the Appellant, Victor Dobbins.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Matthew Pietsch, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background & Procedural History

A Davidson County grand jury returned an indictment alleging that on June 17, 2006, the Appellant committed the offense of unlawful possession of a weapon, as defined by Tennessee Code

Annotated section 39-17-1307. The indictment charged that the Appellant had previously been convicted of a felony drug offense, thereby designating his possession of a handgun unlawful pursuant to subsection (b)(1)(B) of the above section. The Appellant pled not guilty to the charge, and the trial court declared him indigent and appointed him counsel. The State filed notice of its intent to seek enhanced punishment under Tennessee Code Annotated section 40-35-106 and notice of its intent to use convictions or prior bad acts of the Appellant for impeachment purposes at trial. Pursuant to Rule 23 of the Tennessee Rules of Criminal Procedure, the Appellant waived his right to a jury trial.

A bench trial of the Appellant occurred on April 3, 2007. The State introduced the testimony of Audrey Dixon, a Citgo convenience store employee, who testified that she observed the Appellant enter the establishment on June 17, 2006. Dixon recalled that the Appellant walked "straight to the back [of the store] over by the Frito lane" approximately six feet from where she and another store employee were standing. Dixon observed the Appellant "fumbling with his shirt" and saw the "butt of [a] gun" when he lifted his shirt. Dixon notified the other store employee of what she observed and stepped outside the store to call the police on a cell phone, while pretending to empty the garbage. While Dixon was outside, the Appellant also went outside the store and looked around. Dixon then re-entered the store through another entrance and remained in an office from which she could see into the store. Dixon testified that the Appellant then came back into the store and asked the other employee, "[W]here's the other lady at? [sic]," and the other employee informed the Appellant that she did not know. Dixon recalled that the Appellant "stood there for a minute" and then "walked out [and] got in a maroon car" which was parked beside a gas pump. She then observed the car drive away from the store onto the street. Dixon stated that the maroon car had not been parked at the gas pump when the Appellant first appeared at the store. Dixon testified that the Appellant did not make a purchase at the convenience store. On cross-examination, Dixon testified that she had no doubt that the object possessed by the Appellant was a black handled gun. She reiterated that the Appellant appeared to be "fixing the gun . . . like moving it around" when she observed him lift his shirt.

William Patterson, who was employed as an officer for the Metro Nashville Police Department on June 17, 2006, and who responded to Dixon's call, testified that he spotted a maroon car traveling in a direction away from the convenience store. Patterson "did a U-turn" and pulled behind the vehicle, at which time the maroon car pulled into the rear of a homeless shelter, and "[t]hree individuals got out of the vehicle and went different directions." Patterson recalled that he was able to detain the driver of the vehicle, who was a man named Frederick Roper. Patterson searched the vehicle and found a duffel bag in the driver's side floorboard containing a loaded .45 caliber handgun. Patterson testified that the Appellant was detained by other officers approximately two blocks away, at an adult bookstore located near the Citgo convenience store.

At the close of the State's proof, counsel for the Appellant moved for a judgment of acquittal, which was denied by the trial court. The defense then offered the testimony of the Appellant. The Appellant testified that, on the day in question, he had been at an adult bookstore "looking for a video," and that he walked across the street to the Citgo convenience store, entered the store, and

stood in line to purchase a pack of chewing gum. The Appellant testified that while he was in the convenience store, he grabbed his wallet, which was black and thick, in order to get change to pay for gum. He claimed that while he stood in line, he noticed Dixon talking on the phone and walking out of the store. The Appellant testified that he asked the other convenience store employee "what was wrong with [Dixon]" because he "thought maybe she was trying to say [he] was shoplifting or something and stereotype [him] . . . ." The Appellant claimed that he paid for the gum and left the store. He stated that, as he walked outside, a maroon car pulled up to him, and that he "went around to the driver's side of the car on the backseat." After briefly speaking with the car's occupants, one of whom the Appellant identified as Frederick Roper, the Appellant claimed that he exited the vehicle and went back across the street to the adult bookstore, where he was later apprehended by police. The Appellant admitted that he had prior felony drug convictions, and he acknowledged that he was serving community correction sentences on the date of his arrest. Based on the foregoing evidence, the trial court found the Appellant guilty of being a convicted felon in possession of a handgun.

At sentencing, the State introduced the presentence report into evidence, and the parties agreed that the Appellant was to be sentenced as a Range II, Multiple offender. The trial court sentenced the Appellant to four years in the Department of Correction and ordered that the four-year sentence run consecutively to unserved Davidson County community correction sentences stemming from felony drug convictions.

I. Sufficiency of the Evidence

The Appellant argues that "[t]he trial court erred in not directing a verdict of acquittal, as there was insufficient evidence to convict [the] Appellant of being a [f]elon in [p]ossession of a [w]eapon." We would note that our supreme court has held that "a defendant waives his or her right to appeal from a trial court's refusal to grant a motion for judgment of acquittal if the defendant continues to participate in the trial after the close of the State's proof." *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007); *Mathis v. State*, 590 S.W.2d 449, 453 (Tenn. 1979)). In this case, the defense did not rest upon its motion for judgment of acquittal at the close of the State's proof, which was denied by the trial court, instead offering the testimony of the Appellant. Notwithstanding this apparent waiver, we note that the Appellant further frames this issue on appeal as a general challenge to the sufficiency of the evidence supporting his conviction.

Due process requires that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof, which is defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787 (1979). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

In our review of the issue of sufficiency of the evidence, the relevant question is "whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789 (emphasis in original); *see also* Tenn. R. App. P. 13(e). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). In determining the sufficiency of the evidence, this court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, and all factual issues raised by the evidence are resolved by the trier of fact. *Liakas*, 286 S.W.2d at 859.

It is unlawful for a person to possess a handgun if that person has been convicted of a felony drug offense. T.C.A. § 39-17-1307(b)(1)(B) (2005). The defense did not contest the fact that the Appellant was previously convicted of a felony drug offense, and the record contains certified copies of two such convictions. Accordingly, the only remaining element to be proven by the State beyond a reasonable doubt was whether the Appellant possessed a handgun on June 17, 2006.

Dixon, an employee of the Citgo convenience store, provided unequivocal testimony that she observed the Appellant, standing approximately six feet from her in the convenience store, in the possession of a handgun. She further recalled that the Appellant left the store and entered a maroon automobile. Shortly thereafter, Officer Patterson apprehended a maroon vehicle in the immediate vicinity of the convenience store and detained the driver, Frederick Roper, after the other occupants of the vehicle fled. Patterson searched the vehicle and discovered a duffel bag containing a .45 caliber handgun. The Appellant admitted that he entered a maroon vehicle upon leaving the convenience store, and he identified one of the vehicle's occupants as Frederick Roper. After review, we conclude that the evidence presented by the State was more than legally sufficient to sustain the conviction of the Appellant for unlawful possession of a handgun by a convicted drug felon.

II. Sentencing

The Appellant challenges the length of the four-year sentence imposed by the trial court, as well as the decision to run this sentence consecutively to a sentence currently being served for prior drug convictions from 2005.

When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. T.C.A. § 40-35-401(d) (2005). As the Sentencing Commission Comments to this section note, the burden is on the

appealing party to show that the sentencing is improper. *Id.* at § 40-35-401, Sentencing Comm'n Comments. This means that if the trial court followed the statutory sentencing procedure and made findings of facts that are adequately supported by the record, we may not disturb the sentence even if a different result was preferred. *State v. Pike*, 978 S.W.2d 904, 926-27 (Tenn. 1998). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court that are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a *de novo* review of a sentence, we must consider: (1) any evidence received at the trial and/or sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancement factors; (6) any statements made by the defendant on his or her own behalf; and (7) the potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2005); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

A. Sentence Length

The Appellant argues that the trial court "improperly weighed [his] prior record against him, and should not have employed his prior record in enhancing his sentence to the maximum allowable range." He further contends that the trial court failed to consider mitigating evidence, arguing that it "found no mitigating factors whatsoever."

The Appellant's criminal conduct, which is the subject of this appeal, occurred subsequent to the enactment of the 2005 Amendments to the Sentencing Act, which became effective June 7, 2005. The amended statute no longer imposes a presumptive sentence. *State v. Stacey Joe Carter*, No. M2005-02784, SC-R11-CD (Tenn. May 19, 2008). As further explained by our supreme court in *Carter*,

> the trial court is free to select any sentence within the applicable range so long as the length of the sentence is "consistent with the purposes and principles of [the Sentencing Act]." [T.C.A.] § 40-35-210(d). Those purposes and principles include "the imposition of a sentence justly deserved in relation to the seriousness of the offense," *id.* § 40-35-102(1), a punishment sufficient "to prevent crime and promote respect for the law," *id.* § 40-35-102(3), and consideration of a defendant's "potential or lack of potential for . . . rehabilitation," *id.* § 40-35-103(5).

Id. (footnote omitted).

The 2005 Amendment deleted appellate review of the weighing of the enhancement and mitigating factors, as it rendered these factors merely advisory and non-binding in the sentencing determination. Under current sentencing law, the trial court is nonetheless required to "consider" an advisory sentencing guideline that is relevant to the sentencing determination, including the

application of enhancing and mitigating factors. The trial court's weighing of various mitigating and enhancing factors is now left to the trial court's sound discretion. *Id.* Thus, the 2005 revision to Tennessee Code Annotated section 40-35-210 increases the amount of discretion a trial court exercises when imposing a sentencing term. *Id.*

The record reflects that the trial court applied three enhancement factors in its sentencing decision: the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, T.C.A. § 40-35-114(1) (2005); the defendant, before trial or sentencing, has failed to comply with the conditions of a sentence involving release into the community, *id.* at 40-35-114(8); and at the time the felony was committed, the Appellant was on community corrections, *id.* at § 40-35-114(13)(E). The trial court attributed "great weight" to the Appellant's prior criminal record in applying enhancement factor (1), stating: "I mean it's incredible. It's one of the longest records I've ever seen. But it's, again, mainly for misdemeanors." The State correctly notes that "[t]he [Appellant's] criminal record runs from page 5 through 31 of the presentence report." The criminal record of the Appellant, who is forty years of age, includes at least six prior felony convictions and over one hundred misdemeanor convictions, for offenses committed in both Tennessee and Florida, dating back to 1988. We conclude that the trial court's application of enhancement factor (1) was justified.

As to the trial court's application of enhancement factors (8) and (13)(E), the record reflects that the Appellant was convicted of one count of sale of less than one-half (.5) gram of cocaine and one count of sale of a counterfeit controlled substance, in Davidson County Docket No. 2005-I-421. In 2005, the Appellant received three-year and one-year consecutive sentences, respectively, as to these convictions, with placement in the community corrections program. The criminal act at issue in this case occurred on June 17, 2006, and the Appellant admitted that he was on community corrections on that date, and that the community corrections sentences were revoked after he was found guilty of this offense. Accordingly, we further conclude that the trial court's application of enhancement factors (8) and (13)(E) is supported by the record.

Additionally, we would disagree with the Appellant's contention that the trial court found no mitigating factors applicable in this case. The transcript from the sentencing hearing demonstrates that the trial court stated: "[n]ow, looking at any mitigating factors[,] it looks like his conduct neither caused nor threatened serious bodily injury." The trial court thus considered mitigating factor (1), set forth at Tennessee Code Annotated section 40-35-113, but clearly attributed little weight to this factor. Although, the trial court noted that the Appellant "really kind of tried to turn his life around while he's been in custody," it found no other mitigating factors applicable.

Upon thorough review, we conclude that the trial court followed the statutory sentencing procedure, made findings of facts that are adequately supported in the record, and gave due consideration to the principles that are relevant to sentencing. Accordingly, we do not disturb the trial court's imposition of a four-year sentence in this case. The Appellant's challenge to the length of his sentence is without merit.

B. Consecutive Sentencing

Finally, the Appellant characterizes his criminal record as a "predominate misdemeanor history," and argues that the trial court erred in running his sentence consecutively to sentences currently being served for violation of his community corrections sentences in Davidson County Docket No. 2005-I-421.

As a basis for consecutive sentencing, the trial court found Tennessee Code Annotated section 40-35-115(b)(2) applicable, which provides:

> (b) The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:
> . . .
> (2) The defendant is an offender whose record of criminal activity is extensive[.]

We agree that this factor is applicable to the Appellant in the present case based upon his criminal record of over one hundred prior convictions. It is settled law in Tennessee that the presence of a single factor is enough to justify the imposition of consecutive sentences. *See, e.g., State v. Black*, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995). We conclude that the trial court was justified in ordering that the four-year sentence be imposed consecutively to sentences for felony convictions from Davidson County Docket No. 2005-I-421. Accordingly, this issue is without merit.

CONCLUSION

Based upon the foregoing, the judgment of the Davidson County Criminal Court is affirmed.

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DAVID G. HAYES, SENIOR JUDGE